

OGC REVIEW COMPLETED

OGC 74-0710
24 April 1974

MEMORANDUM FOR: DD/M&S

SUBJECT: Comparison of Overtime Requirements
Under CIA Regulations, Title 5 and
The Fair Labor Standards Act

REFERENCES: a) Civil Service Commission Memo to
D/Pers, dtd, 19 Apr 74, subj, Proposed
Interim Instructions to Implement
the Fair Labor Standards Act

b) Memo fr C/PMCD to D/Pers, dtd,
19 Apr 74, subj, Fair Labor Standards
Act Amendments of 1974

1. This is in response to your request of 22 April for a breakout of the requirement to pay for overtime work under current CIA regulations, Title 5 of the U. S. Code, and the Fair Labor Standards Act, as amended.

2. As you know, on 8 April the President signed P.L. 93-259, the Fair Labor Standards Act Amendment of 1974. The amendment of Section 3(e) of the Act, the "coverage" section, to include for the first time "any individual employed by the Government of the United States -- in any executive agency (as defined in Section 105 . . .)" of Title 5 of the U. S. Code, causes the Act to be applicable to most Government agencies including CIA. In addition, the Civil Service Commission has the statutory responsibility of administering the Act within most Government agencies, including CIA. Per Reference A:

The FLSA, as amended by P.L. 93-259, does not repeal, amend, or otherwise modify any existing federal pay laws. Rather, the FLSA establishes a minimum standard to which covered employees are entitled. To the extent that the FLSA would provide a greater pay

benefit to an employee (e.g., a higher overtime rate) than the benefit payable under other existing pay rules, the employee is entitled to the FLSA benefit. If other existing pay rules provide a higher benefit, of course, the employee continues to receive that benefit. No Federal employee's pay or pay related benefits (overtime, Sunday pay, etc.,) will be reduced to conform to the FLSA minimum standards.

3. The following are general statements on the requirements for overtime compensation, or compensatory time off in lieu thereof under CIA regulations, Title 5 of the U. S. Code, and the FLSA. Certain exceptions, not applicable to the great majority of Agency and other federal employees, have been omitted.

A. What Hours of Work are Considered Overtime Hours?

i. CIA: "Compensable overtime is that work performed by an employee in excess of the normal basic workweek which has been authorized by a designated senior official as compensable."

[redacted] "The basic 40-hour workweek consists of five consecutive duty days, normally Monday through Friday."

[redacted] "The basic nonovertime workday does not exceed eight hours." [redacted]

ii. Title 5: "Hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or . . . in excess of 8 hours in a day, performed by an employee are overtime work . . ." 5 U.S.C.A. 5542(a).

iii. FLSA: Generally, ". . . no employer shall employ any of his employees . . . for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours specified at a rate not less than one and one-half times the regular rate at which he is employed. Sec 7(c). Under the FLSA overtime is compensable if the employer suffers or permits it to be worked. "In other words, for nonexempt employees overtime need not be 'officially ordered or approved' as is presently required.

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Under the concept, any work performed by a nonexempt employee for the benefit of the agency, whether requested or not, is working time if the employer knows of or has reason to believe it is being performed. Thus a nonexempt employee who commences work prior to the scheduled shift, or continues to work during meal periods or at the end of the shift, even though the work was not requested, is entitled to compensation for overtime work." (In this regard see paragraph 7c, Ref. A.)

B. Rate of Overtime Compensation.

i. CIA: "The overtime pay rate is one and one-half times the hourly rate of basic salary but will not exceed one and one-half times the minimum scheduled rate for GS-10."

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[redacted] Thus, no overtime hourly rate may be greater than one and one-half times the first step of a GS-10.

ii. Title 5: Essentially the same provisions as followed by CIA. 5 U.S.C.A. 5542(a)1.

iii. FLSA: ". . . a rate not less than one and one-half times the regular rate at which he . . . (the employee) . . . is employed." Sec. 7(a). Note that "regular rate" includes the scheduled or basic rate, night differential, and Sunday premium pay. (See paragraph 9c, Ref. A.)

C. Compensatory Time.

i. CIA: a) Employees, GS-11 and below, may, at their request, receive compensatory time off in lieu of payment for directed overtime; b) Employees, GS-12 through GS-14, may also receive compensatory time off if they request it, but only to the extent the hours are otherwise compensable as overtime;

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[redacted] c) Also, employees, GS-15 or above, may receive compensatory time only to the extent the hours are compensable as overtime. [redacted]

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ii. Title 5: "The head of an agency may --

(1) on request of an employee, grant . . . compensatory time off . . . instead of payment for an equal amount of time spent in irregular or occasional overtime work; and

(2) provide that an employee whose rate of basic pay is in excess of the maximum rate of basic pay for a GS-10 shall be granted compensatory time off . . . instead of being paid for that work." 5 U.S.C.A. 5543. In other words, for those employees who make more than the maximum basic GS-10, the head of an agency may direct that they only receive compensatory time.

iii. FLSA: No comparable provision. "The FLSA requires that a non-exempt employee be compensated for hours in excess of 40 hours a week at a rate not less than one and one-half times his regular rate. This means that compensatory time off for overtime work is not appropriate for a non-exempt employee. A non-exempt employee must be paid for overtime work." Subparagraph 9d, Ref. A.

D. Exemptions From Overtime.

i. CIA: a) Employees GS-11 and below, may receive overtime for all hours of directed overtime except, that in any pay period, an employee's aggregate compensation (basic salary, overtime, holiday pay, annual premium pay, night differential, or compensatory time off in lieu of overtime) may not exceed the maximum scheduled rate for a GS-15; b) GS-12 thru GS-14 employees may NOT be compensated for the hours of directed overtime between 40 and 48 either by overtime pay or compensatory time, UNLESS the directed hours are: "on a position which requires substantial amounts of overtime work on a continuing basis and the productivity is predominately measurable in units of production or hours of duty performed; on any day during a work period of seven or more consecutive days;" or, "on a job the duties of which are substantially unrelated to the primary assignment." The same aggregate compensation limitation applies with respect to exceeding the maximum scheduled rate for a GS-15; c) GS-15 employees may not receive overtime or compensatory time in lieu thereof, except in the case of a "production" oriented position or unless the second job concept mentioned above applies. In addition, the aggregate compensation limitation applies.

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ii. Title 5: "An employee may be paid premium pay . . ." (overtime, annual premium pay, Sunday and holiday pay) ". . . only to the extent that payment does not cause his aggregate rate of

pay for any pay period to exceed the maximum rate for a GS-15." 5 U.S.C.A. 5547.

iii. FLSA: There are a host of exemptions from both the minimum wage and overtime requirements of the Act, but those most applicable to the Agency are the so-called executive, administrative, and professional exemptions. Sec. 13. At Ref. A, Attachment 1, pages 4 and 5, the Commission provides guidance for determining the exempt or nonexempt status of employees within the three categories. Department of Labor regulations which define and delimit the three terms are provided for your comparison as Attachment 1 hereto.

4. The identification of employees as "exempt or non-exempt" and the determination of payment for overtime under the provisions of both the Agency's regulation and the FLSA are the chief problems with which we are now concerned. However, existing CIA occupational categories of employees follow an occupational coding system similar to that of the Civil Service Commission. It is proposed that the Office of Personnel identify all employees as "exempt" or "nonexempt" by following the CSC guidelines, within the next few days. Thereafter, we will be better able to determine the extent of the problem and how Agency regulations can be changed to solve it. In addition, it is recommended that the Office of Finance be charged with developing a procedure to accomplish the dual computation of overtime as required by the Act. By the terms of the Act, the Commission is relieved of its administration with respect to individuals employed in the Library of Congress, United States Postal Service, Postal Rate Commission, and Tennessee Valley Authority. While the charge on the Commission to administer the Act in other Government agencies is couched in rather strong terms, we believe that because the Agency is specifically exempt from the classification Act of 1949 with the result that the Commission has never "classified" CIA positions, the

Office of Personnel should approach the Commission with a view toward securing an exception from it concerning administering the Act within the Agency.

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Chief

Position Management & Compensation Division

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Assistant General Counsel

Attachments

cc: Office of Finance
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D/Pers
C/CMPD



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